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NO. 85-5404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari
To The Illinois Supreme Court

PETITIONER'S OPENING BRIEF ON MERITS

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1985
CERTIORARI GRANTED NOVEMBER 12, 1985

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment privilege against self-incrimination apply in an Illinois sexually-dangerous-person proceeding, a proceeding which arises only in the context of a criminal prosecution, is conducted much like a criminal trial, and results in both an adjudication of sexual dangerousness and an indeterminate commitment to the Illinois Department of Corrections?

2. Whether, since the privilege should be held to apply to such a proceeding, the respondent could properly show the petitioner's dangerousness with psychiatric opinions based on his statements made while in custody and during compulsory exams not preceded by Miranda-style advice?

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OPINION BELOW

The opinion of the Illinois Supreme Court in this case is reported as People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985). (The court's opinion is also set forth in the Joint Appendix at pages 41 to 52.)

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court was filed on July 17, 1985. The petition for writ of certiorari was filed within 60 days thereafter and granted by order of this Court on November 12, 1985.

This Court's jurisdiction in the matter rests on 28 U.S.C. Sec. 1257(3) inasmuch as petitioner asserts a violation of his rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Sexually Dangerous Person Act, Article 105 of the Illinois Code of Criminal Procedure. Ill. Rev. Stat. ch. 38, §§105-1.01, et seq. (See Appendix A.)

STATEMENT OF THE CASE

The petitioner Terry B. Allen (hereinafter referred to as the petitioner) was committed to the Illinois Department of Corrections for an indeterminate term following his adjudication as a sexually dangerous person. That adjudication was based, in large part, upon statements the petitioner had made to two court-appointed psychiatrists in separate compulsory examinations. Throughout the trial- and appellate-court processing of his case, the petitioner maintained that the use of his statements violated his Fifth Amendment privilege against self-incrimination. The Illinois Supreme Court ruled, however, that he had no privilege to claim in a sexually-dangerous-person action.

The proceeding against the petitioner began with the filing of an information charging him with the offenses of deviate sexual assault and unlawful restraint, violations of Ill. Rev. Stat. ch. 38, §§11-3(a) and 10-3(a), respectively (J.A. 1-2). Citing the same sex offense, the State then filed a petition to have the petitioner declared a sexually dangerous person under Article 105 of the Code of Criminal Procedure [Ill. Rev. Stat. ch. 38, §105-1.01, et seq. (1981)] (J.A. 3-4). That declaration required proof of a person's 1) having a mental disorder for one year or more, his 2) having criminal propensities to the commission of sex offenses and his 3) having demonstrated those

propensities toward acts of sexual assault. Ch. 38, §105-1.01. Pursuant to statute, the court appointed two psychiatrists to examine the petitioner in regard to the sexual-dangerousness petition (J.A. 5).

The trial court later conducted a preliminary hearing on the charges in the information and dismissed them for lack of probable cause (J.A. 6). Since the dangerousness petition depended upon a valid underlying charge, it was dismissed as well. The petition was reinstated, however (C41), after the petitioner was indicted for the original offenses of sexual assault and unlawful restraint (J.A. 7-8).

The petition came on for hearing before the court, the petitioner having waived his right to a jury. Three witnesses testified at that hearing, all on behalf of the prosecution. The two psychiatrists who had examined the petitioner took the stand. Each opined that the petitioner was a sexually dangerous person as defined in Article 105 (R.101-02; R.128-131; J.A. 35,40). Each also noted that his opinion was based on statements made by the petitioner during the court-ordered custodial examination (R.94; R.135), which in each case was wide-ranging and involved discussion of the petitioner's prior sexual activity (which included no prior convictions) (R.117-118; R.131; J.A. 38).

The alleged victim of the charged sexual assault, Christine Ray, also testified for the prosecution. She testified that she

conversed with petitioner about 30 to 45 minutes at a McDonald's Restaurant where she had been working. After the conversation ended, Ray left in her automobile. She noticed the petitioner in her back seat. The petitioner asked her to take him to "a romantic place -- or else". Ray drove to an airport parking lot where the petitioner lay on top of her and simulated intercourse, although both were fully clothed. After petitioner removed his pants, Ray manipulated his penis manually, agreeing to satisfy him if he would let her leave. According to Ray, petitioner then pushed her head down, forcing her to perform fellatio. Ray subsequently entered the parking terminal alone to pay the parking fee. She told the attendant that a man had forced her to go to the airport, but she made no other attempt to summon help. Ray returned to the car and gave petitioner a ride to his friend's home (J.A. 43-45).

At the conclusion of the hearing, the trial court found the petitioner to be a sexually dangerous person (J.A. 11). It also committed the petitioner to the Illinois Department of Corrections (J.A. 13), where, by Illinois law, he will be obliged to remain until he proves that he is no longer sexually dangerous [Ill. Rev. Stat. ch. 38, §105-9 (1981)].

The petitioner filed a motion to vacate the adjudication and commitment (J.A. 12,14-16), repeating his assertions from the dangerousness hearing (e.g., R.87-91; R.96-97; R.129) that the

prosecution's use of the psychiatrists' opinions violated his Fifth Amendment privilege against self-incrimination. Seeing that motion denied (J.A. 21), the petitioner filed a notice of appeal.

The petitioner's adjudication and commitment were reversed on appeal to the Appellate Court of Illinois, Third Judicial District. The court ruled that the admission of the psychiatrists' conclusions had in fact violated the petitioner's privilege against self-incrimination since they were based upon petitioner's compelled inculpatory statements during the psychiatric exams. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984) (J.A. 23-28).

After granting the State's petition for leave to appeal, the Illinois Supreme Court reversed the Appellate Court and reinstated petitioner's adjudication and commitment. As noted above, the court ruled that there is no privilege against self-incrimination in Illinois' sexually-dangerous-person proceeding. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) (J.A. 41-52).

SUMMARY OF ARGUMENT

Throughout the process by which he was adjudicated a sexually dangerous person and indefinitely committed to the Illinois Department of Corrections, the petitioner has claimed a violation of his Fifth Amendment privilege against self-incrimination. The Illinois Supreme Court affirmed the adjudication and commitment, bluntly ruling that the privilege did not apply in Illinois' sexually-dangerous-person proceeding. That ruling, though, is erroneous under the precedents of this Honorable Court and must be reversed.

A. The Illinois sexual-dangerousness proceeding is denominated "civil" in nature, both by the legislature and the case law interpreting it. Examination of the proceeding reveals, however, the close relationship between it and a criminal prosecution. An allegation of sexual dangerousness, first of all, can be advanced only in the context of an existing criminal case. Dangerousness proceedings, once commenced in lieu of formal criminal prosecution, are carried on much like a criminal trial: the accused has rights to counsel, a jury hearing and confrontation of the witnesses against him. The prosecution must prove beyond a reasonable doubt that the accused 1) has a mental disorder in existence for a year or more, 2) has criminal

propensities to the commission of sex offenses and 3) has demonstrated those propensities toward acts of sexual assault or child-molestation. If the prosecution meets its burden, the accused is declared a sexually dangerous person and is committed to the Illinois Department of Corrections for an indeterminate term. He is released from penal confinement only if he can prove, by a preponderance of the evidence in a recovery action, that he is no longer sexually dangerous. Numerous aspects of the dangerousness proceeding, particularly the close relation to a criminal prosecution and the end result of indefinite commitment to a penal facility, belie the proceeding's label as "civil".

B. In critical respects, this Illinois sexually-dangerous-person proceeding is similar to other proceedings examined by this Honorable Court. It is a sexual-psychopath proceeding much like those considered in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), Specht v. Patterson, 386 U.S. 605 (1967) and Humphrey v. Cady, 405 U.S. 504 (1972). Those decisions of this Court recognize the extreme seriousness of the sexual-psychopath proceeding and the grave potential for its abuse and, as a consequence, call for a "full panoply" of procedural protections, "all those safeguards which are fundamental rights and essential to a fair trial". Specht. The privilege against self-incrimination must be included among those safeguards, not only because the privilege is necessary to deter

potential abuse of the dangerousness proceeding but also because the privilege is recognized as an "essential mainstay" of the accusatorial system [Malloy v. Hogan, 378 U.S. 1, 7-8 (1964)].

Specific Fifth-Amendment jurisprudence of this Court supports the applicability of the privilege to the sexual-dangerousness proceeding. The privilege has been held to apply in widely disparate types of proceedings. Importantly for purposes of this case, this Court has ruled the privilege applicable in juvenile proceedings [In re Gault, 387 U.S. 1 (1967)] and capital sentencing proceedings [Estelle v. Smith, 451 U.S. 454 (1981)]. Gault and Estelle counsel against reference to the "'civil' label-of-convenience" attached to a proceeding and call instead for consideration of the exposure which a compelled statement invites. The exposure involved in the sexual-dangerousness proceeding is both an indeterminate commitment to a penal facility and a severe stigmatization as a mental defective with criminal sexual propensities. That exposure demands that the privilege be held applicable to the proceeding.

C. The Illinois Supreme Court ruled the privilege inapplicable but that ruling cannot be sustained even on its own terms. The court focused on the "civil" label attached to the proceeding, obviously in contravention of In re Gault. It also focused on the supposed treatment purpose of the proceeding -- a focus which blinks the hard realities of both indefinite

commitment to a penal institution and severe stigmatization as a "sexually dangerous person". A proceeding which results in an adjudication of sexual dangerousness and indefinite incarceration cannot reasonably be termed "civil" so as to avoid application of the Fifth Amendment.

In rejecting the application of the privilege, the Illinois court also weighed various interests involved in the dangerousness proceeding. It was both slow and fast, light and heavy, though, in placing thumbs upon the scales. It conceded that the private interest was "great" -- no overstatement given the commitment and stigmatization involved. The court also thought the privilege to be of little value in insuring the reliability of the proceeding -- though an obvious concern of the privilege is the reliability of compelled statements, especially those made, as here, by persons with alleged mental disorders. Finally, the Illinois court thought that the purpose of the proceeding would be totally thwarted if the privile were applicable -- a theory which ignores that the prosecution can prove both criminal propensities and their demonstration as easily with other evidence and that, under Illinois' civil-commitment scheme, application of the privilege is not deemed an impairment of the commitment process.

D. If, contrary to the Illinois Supreme Court's ruling, the privilege against self-incrimination does apply to Illinois'

sexually-dangerous-person proceeding, then the petitioner's adjudication here surely must be reversed. That conclusion is as clear as is the violation of the Fifth Amendment privilege in this case under the principles of Estelle v. Smith, 451 U.S. 454 (1981). The petitioner here was required to speak to two court-appointed psychiatrists. Those experts, examining the petitioner in a custodial setting, went beyond the neutral purpose of judging the petitioner's mental condition to the decidedly adverse purpose of calculating his sexual dangerousness as defined in the pertinent statute. Even though the petitioner offered no psychiatric evidence of his own, the experts gave opinions of the petitioner's being sexually dangerous -- basing their opinions on the petitioner's statements during the compulsory exams. These exams were not preceded by advice regarding the petitioner's right to silence or the potential use of any statements he made. Given these circumstances, Estelle v. Smith compels the conclusion that the prosecution could not properly introduce the psychiatric opinions against the petitioner in its attempt to establish his sexual dangerousness.

ARGUMENT

BECAUSE THE PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD BE HELD TO APPLY IN AN ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING (A PROCEEDING CLOSELY RELATED TO A CRIMINAL PROSECUTION AND RESULTING IN A FINDING OF DANGEROUSNESS AND AN INDETERMINATE COMMITMENT TO A PENAL INSTITUTION), THE RESPONDENT COULD NOT PROPERLY SHOW PETITIONER'S DANGEROUSNESS WITH PSYCHIATRIC OPINIONS BASED ON HIS STATEMENTS MADE WHILE IN CUSTODY AND DURING COMPULSORY EXAMS NOT PRECEDED BY MIRANDA-STYLE ADVICE.

The Fifth Amendment of the Constitution of the United states -- made applicable to the states by virtue of the Fourteenth Amendment [Malloy v. Hogan, 378 U.S. 1 (1964)] -- demands that no person "shall be compelled in any criminal case to be a witness against himself" (emphasis added). The question presented here is whether that privilege against self-incrimination applies in a sexually-dangerous-person proceeding under Article 105 of Illinois Code of Criminal Procedure. Such a proceeding arises only in the context of a criminal prosecution, follows closely the procedure of a criminal trial and results in a special dangerousness finding and an indeterminate commitment to an institution of the Illinois Department of Corrections. The Supreme Court of Illinois nevertheless labeled the proceeding "civil" in nature and ruled

that the accused person in such a proceeding had no Fifth Amendment privilege against self-incrimination. Since that ruling is clearly erroneous under the precedents of this Honorable Court, the petitioner respectfully requests its reversal.

The question of the applicability of the Fifth Amendment privilege is squarely presented in the case at bar. The petitioner, initially named in a criminal information, was thereafter alleged to be a sexually dangerous person under Article 105. By virtue of that Article, he was required to be examined by two psychiatrists. In the subsequent hearing on the sexually-dangerous-person petition, those psychiatrists opined that the petitioner was such a person -- basing their opinions, in substantial part, upon the petitioner's statements to them in the course of the compulsory examinations. The petitioner resisted the introduction of the psychiatric opinions, claiming the privilege of the Fifth Amendment and pointing to the psychiatrists' failure to warn him of that privilege and of the possible use of his statements to them. That challenge failed and the petitioner was adjudicated a sexually dangerous person and committed to the Department of Corrections indefinitely. His argument regarding the applicability of the privilege against self-incrimination and the consequent need for pre-examination warnings was accepted on his appeal to the Appellate Court of

Illinois. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984) (J.A. 23-28). The Illinois Supreme Court disagreed, however, flatly ruling that the petitioner had no privilege against self-incrimination to assert in the course of the proceeding against him and, thus, that pre-exam warnings were unnecessary. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) (J.A. 41-52).

In arguing the error of that ruling in this Court, the petitioner examines first the operation of the sexually-dangerous-person process in Illinois. He goes on to demonstrate that this type of proceeding is so serious in nature and so open to potential abuse that, under precedents of this Court, it necessarily must involve the protection of the Fifth Amendment. He shows additionally that that conclusion is certainly borne out by analysis of the Article 105 proceeding in the light of specific Fifth-Amendment jurisprudence of this Court. The no-privilege decision of the Illinois Supreme Court, the petitioner goes on to show, cannot be sustained as it focuses only on a "civil" label attached to the proceeding and miscalculates the interests involved in the process. Finally, the petitioner demonstrates that the adjudication against him must be reversed since the State's use of psychiatric evidence in that proceeding violated the privilege against self-incrimination which he enjoyed.

A. THE ILLINOIS SEXUALLY DANGEROUS PERSON PROCEEDING, THOUGH DENOMINATED "CIVIL" IN NATURE, ARISES ONLY IN THE CONTEXT OF A FORMAL PROSECUTION FOR CRIME, IS CONDUCTED MUCH LIKE A PROSECUTION FOR CRIME, AND -- LIKE A CRIMINAL PROSECUTION -- CAN RESULT IN A COMMITMENT TO THE DEPARTMENT OF CORRECTIONS.

The petitioner's involvement with Illinois' sexually-dangerous-persons proceedings began with his being charged, by information filed in the Circuit Court of Peoria County, Illinois, with the offenses of deviate sexual assault and unlawful restraint (J.A. 1-2). See Ill. Rev. Stat. ch. 38, §§11-3(a) and 10-3(c) (1981). Some three weeks later, the prosecution filed a petition alleging that the petitioner was a sexually dangerous person (J.A. 3-4). In that petition, the state specifically cited the deviate sexual assault which was the subject of the earlier information.

Article 105 of the Illinois Code of Criminal Procedure, cited in the State's petition against the petitioner, defines "sexually dangerous persons" as

> [a]ll persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward

acts of sexual assault or acts of sexual molestation of children.

Ill. Rev. Stat. ch. 38, §105-1.01 (1981). The allegation and adjudication of being a sexually dangerous person thus involves three distinct elements: a mental disorder existing for a year or more, criminal propensities to commit sex offenses and a demonstration of those propensities toward sex offenses. See People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28, 30 (1976); People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), rev'd on other grounds, 107 Ill. 2d 91, 481 N.E.2d 690 (1985).

This sexually-dangerous-person legislation was initially enacted in 1938 and reformulated in 1955. See Ill. Rev. Stat. ch. 38, §§820.01-825e (1960 Supp.). In 1963, it was incorporated into the Illinois Code of Criminal Procedure as Article 105. In its original form, the legislation was considered an expansion of the concepts of fitness and sanity and was designed to prevent persons with sexual-related mental disorders from being tried. See People v. Redlich, 402 Ill. Ill. 270, 83 N.E.2d 736, 739-740 (1949). With its reformulation in 1955, however, the legislation changed its focus. In changing from the initial Criminal Sexual Psychopathic Persons Act to the 1955 (and present) Sexually Dangerous Persons Act, the process shifted in purpose to providing treatment of an accused's sex-offense propensities and to protecting the public from the accused until his treatment has

been effected. See People v. Burkhart, 116 Ill. App. 3d 708, 452 N.E.2d 375, 377 (1983).[1]

The Sexually Dangerous Persons Act specifically announces that it is civil in nature. Ill. Rev. Stat. ch. 38, §105-3.01 (1983). Examination of the Act and case law interpreting it, however, reveals the many relationships and similarities between the sexually-dangerous-person proceeding and the formal criminal prosecution. The proceeding, first of all, does not arise in any context other than a formal prosecution for crime. An allegation of sexual dangerousness is possible only after a person has been charged with a criminal offense. See ch. 38, §105-3; Potts v. People, 80 Ill. App. 2d 195, 224 N.E.2d 281, 283 (1967). The criminal charge and dangerousness proceeding are closely related; indeed, the proceeding cannot continue if the underlying criminal charge fails. People v. Nastasio, 19 Ill. 2d 524, 168 N.E.2d 728, 732 (1960).

The decision to proceed under the Act rather than with the formal prosecution is totally within the discretion of the prosecutor. Neither the criminal defendant nor the court may

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[1] Illinois commentators writing at the time of the enactment of the initial legislation, however, noted even then a strong legislative interest in protecting the public from the sex offender. See Stewart, Comment Concerning Proposed Legislation for the Commitment of Sex Offenders, 3 J. Mar. L. Q. 407 (1938).

seek a dangerousness proceeding. People v. Newbern, 18 Ill. App. 3d 532, 310 N.E.2d 42, 47-48 (1974). The prosecutor, though, must make an election. He cannot first obtain a conviction for a criminal offense and then commence a dangerousness proceeding based on the same incident. People v. Patch, 9 Ill. App. 3d 134, 293 N.E.2d 661, 665 (1973).

If the prosecutor does file a petition alleging a person's sexual dangerousness, the court is obliged to appoint two psychiatrists to examine the accused (called the "respondent" in the proceeding). Ch. 38, §105-4 (1981). The psychiatrists personally examine the respondent and file their reports in writing with the court, also serving a copy upon the accused himself. Id. This examination provision of the Act is strictly construed. People v. Pygott, 64 Ill. App. 2d 284, 211 N.E.2d 382 (1965). The psychiatrists must file their reports as required. See People v. McDonald, 44 Ill. App. 2d 348, 194 N.E.2d 541 (1963). The reports or testimony of one or both of these psychiatrists is essential to the dangerousness proceeding. People v. Dykema, 89 Ill. App. 2d 409, 232 N.E.2d 471 (1967).

Counsel must be appointed to represent the accused during further proceedings under the Act. Ch. 38, §105-5; People v. Jenneski, 36 Ill. 2d 624, 225 N.E.2d 19 (1967). The respondent has the right to demand trial by jury on the question of his sexual dangerousness. Ch. 38, §105-5. The matter then comes on

for formal hearing, during which the respondent enjoys the right to confront and cross-examine witnesses. People v. Nastasio, 168 N.E.2d at 731. The court must rigidly adhere to the procedural rules in the course of the hearing and insist upon the introduction of competent evidence. People v. Pearson, 65 Ill. App. 2d 264, 212 N.E.2d 715, 716 (1965). The prosecution, though, is authorized to introduce evidence of other criminal activity on the respondent's part in order to prove his dangerousness. Ch. 38, §105-5; People v. Sims, 382 Ill. 472, 47 N.E.2d 703, 705 (1943). At the conclusion of the hearing, the trier of fact is asked to determine whether the prosecution has proved the person's sexual dangerousness beyond a reasonable doubt. Ill. Rev. Stat. ch. 38, §105-3.01 (1983); People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

If that decision is in the accused's favor, the dangerousness process ends -- with the prosecution seemingly free to proceed on the underlying criminal charge.[2] If the decision is one of the respondent's sexual dangerousness, however, the court is obliged to commit the respondent to the custody of the Illinois Department of Corrections. The Department, in turn, is

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[2]Research reveals no Illinois authority precisely on point. It is clear, though, that the underlying charge remains in effect. See Ill. Rev. Stat. ch. 38, §105-9 (1981).

required by statute to "keep safely the person so committed", to place the person in any of its facilities "set aside for the care and treatment of sexually dangerous persons". Ch. 38, §105-8 (1981). The statute permits the Department to transfer the committed person to another state Department or Agency (Id.) but requires that the Department at all times provide care and treatment designed to effect the person's recovery. Id.; People v. Shiro, 52 Ill. 2d 279, 287 N.E.2d 708, 711 (1972).[3]

The sexually dangerous person's commitment to the Department is indefinite in duration. The person is permitted by statute to file, at any time following commitment, an application showing that he has recovered. Ch. 38, §105-9. The Department of Corrections responds with a socio-psychiatric report on the applicant and the matter is set for hearing before the original committing court. Id. That hearing must be commenced within a

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[3]In practice, the sexually dangerous person in Illinois is routinely sent to the Menard Psychiatric Center in southern Illinois. The Center, a maximum-security penal institution, originally was part of the century-old Menard Penitentiary but was designated a separate facility in 1933. It houses not only sexually dangerous persons but also, in far greater number, prisoners from other institutions who are referred to the Center for psychiatric treatment. Directory of Juvenile and Adult Correctional Agencies, at Ill. 115 (A.C.A. 1984).

Research reveals no transfer of a sexually dangerous person to another Department or facility, probably because of security concerns.

reasonable time following the recovery application [People v. Abney, 90 Ill. App. 2d 235, 232 N.E.2d 784, 786 (1967)]; the committed person again enjoys the rights to counsel and to a hearing by jury (People v. Shiro, 287 N.E.2d at 710). He is required, though, to prove his recovery by a preponderance of the evidence. People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-1316 (1982).

Three dispositions are possible at the conclusion of this recovery hearing. If the applicant proves that he is no longer dangerous, he is discharged and the underlying criminal indictment or information is quashed. Ch. 38, §105-9. If he does not sustain his burden, on the other hand, he is simply returned to the Department. If, as a matter of a middle ground, the court entertains doubts as to the applicant's full recovery, it may conditionally release him under such supervision as will protect the public. Id.; People v. Whitney, 33 Ill. App. 3d 729, 338 N.E.2d 233 (1975). [That conditional release may be revoked, however, upon proof -- during a probation-revocation-style hearing -- that the person has violated a condition of his release. Ch. 38, §105-9; People v. Davis, 127 Ill. App. 3d 49, 468 N.E.2d 172 (1984).]

The recovery petition under Section 105-9, as just discussed, is the sexually dangerous person's primary "ticket" to release from his commitment. The Department of Corrections is

permitted, but not required, to seek the person's conditional release upon his suggested recovery. Ch. 38, §105-10. The person's commitment to the Department of Corrections, nevertheless, is primarily dependent upon his ability to prove his recovery and is thus truly indeterminate in length.[4]

The sexually-dangerous-person process in Illinois, as just discussed, is the process in which the petitioner found himself entangled. That process is legislatively branded civil in nature and seemingly designed to effect treatment of a sex-related mental disorder. Nevertheless, it is clear that the process is very much related to a formal criminal prosecution since it can arise only upon a criminal accusation, follows procedures much like a criminal trial and results in a commitment to the Department of Corrections, a commitment different from an Illinois criminal sentence only in being indeterminate.

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[4]The average length of commitment of a sexually dangerous person is not documented. The case law informs, however, of commitments of substantial length. Eg., People v. Thingvold, 113 Ill. App. 2d 479, 251 N.E.2d 553 (1969) (six years); People v. Parrott, 438 N.E.2d 1313 (seven years); People v. Sweeney, 114 Ill. App. 2d 81, 251 N.E.2d 897 (1969) (eight years); People v. Shiro, 287 N.E.2d 708 (ten years); People v. Capoldi, 37 Ill. 2d 11, 225 N.E.2d 634 (1967) (fourteen years) and People v. Sly, 82 Ill. App. 3d 742, 403 N.E.2d 72 (1980) (fourteen years).

The range of non-extended criminal sentences for the most serious sex offenses in Illinois, on the other hand, is from six to thirty years [Ill. Rev. Stat. ch. 38, §§12-14(c),

(Footnote Continued)

B. SINCE THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING IS SO RELATED TO A FORMAL CRIMINAL PROSECUTION, INVOLVES A DISTINCT ADJUDICATION OF DANGEROUSNESS, AND RESULTS IN AN INDEFINITE COMMITMENT TO A PENAL INSTITUTION, PRECEDENTS OF THIS COURT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THAT PROCEEDING.

This Honorable Court has not previously addressed the Illinois Sexually Dangerous Persons Act, the procedures of which have been discussed in detail at Part A above. Thus the Court has had no occasion to determine the adequacy of the procedural rights granted to an Illinois respondent in a proceeding under the Act nor to address the precise question presented here regarding the applicability of the Fifth Amendment privilege against self-incrimination in that proceeding. Decisions of this Court regarding similar statutes and similar proceedings, however, compel the conclusion that the privilege is indeed applicable and was improperly denied the petitioner in the court below. That conclusion, in turn, is supported by specific statements of this Court on the Fifth Amendment.

(Footnote Continued)
1005-8-1(a)(3) (1983)] with day-for-day credit for good time [Ill. Rev. Stat. ch. 38, §1003-6-3(a)(2) (1983)].

This Court has considered "sexual psychopath" statutes like the Illinois Sexually Dangerous Persons Act in some detail on at least three occasions. In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), the Court considered a vagueness challenge to Minnesota's Sexual Psychopathic Personality Law. Twenty-seven years later, in Specht v. Patterson, 386 U.S. 605 (1967), a habeas corpus petitioner challenged the lack of a hearing and a right of confrontation in hearings under the Colorado Sex Offenders Act. Finally, in 1972, the Court considered equal-protection challenges to the procedures involved in Wisconsin's Sex Crimes Act. Humphrey v. Cady, 405 U.S. 504 (1972).

The statutes involved in the three cases differed in some respects. Minnesota's statute contemplated a prosecutor's filing a petition against a person alleged to have a "psychopathic personality" as defined in the statute. This filing would be followed by a commitment hearing in which psychiatrists would participate and at which the "patient" would be represented by counsel and could call witnesses. Under the Colorado statute in Specht, a convicted sex offender would be examined by psychiatrists. The psychiatric reports would be filed with the court, which would then, without further hearing, determine whether the offender should be sentenced to the indefinite term of from one day to life under the Act. The Wisconsin procedure

considered in Humphrey was also a post-conviction procedure, one which was triggered by the trial court's finding a sexual-excitement motivation for the crime. That finding would be followed by examination of the defendant and a hearing on the need for treatment of the offender's "aberrations". If treatment was needed, the defendant would be committed to the Department of Public Welfare for a period equal to the maximum sentence for his crime -- a period which could be extended indefinitely in five-year intervals if the defendant remained dangerous.

Though the statutes differed, the Court was uniformly concerned with possible abuses and with the deprivation of fundamental rights. The Court upheld the Minnesota statute on its face but, in doing so, assumed that the substantial rights of the persons charged would be adequately safeguarded at every stage of the proceeding. Pearson v. Probate Court, 309 U.S. at 276-277. In Humphrey v. Cady, the Court noted the substantial nature of the petitioner's claims and found that they warranted an evidentiary hearing. Of particular concern to the Court was the allegation that the procedural requirements of the Sex Crimes Act differed significantly from the state's requirements for mental-health commitments even though the processes were much the same, or the former more onerous, in result. In the interim, in Specht v. Patterson, the Court rejected Colorado's contention that its Sex Offenders Act was merely a sentencing procedure.

The Act, according to the Court, contemplated a new finding of fact beyond the conviction and a radically different punishment of indeterminate length. Citing and approving the decision in United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966), the Court noted that the defendant was entitled to the "full panoply" of procedural protections which due process guaranteed in state criminal proceedings, "all those safeguards which are fundamental rights and essential to a fair trial". Specht v. Patterson, 386 U.S. at 609-610.

Taken together, these three decisions of the Court demonstrate that sexual-psychopath statutes are so serious in character and so open to potential abuse as to demand full procedural protection for the persons brought within their operation. "[P]artial or niggardly" protections are inadequate, especially if they fall short of protections present in simple mental-health commitments or fail to deter potential abuse. The decisions thus compel the conclusion that the Fifth Amendment's privilege against self-incrimination is applicable in Illinois' sexual-psychopath proceeding.

That proceeding, it must be noted, is open to the abuse feared by this Court in Pearson v. Probate Court. A prosecutor -- the only party who can initiate a dangerousness proceeding -- may confront an individual who, despite a proved or unproved record of prior criminal activity, can be charged only

with a misdemeanor offense and punished only with a short term of imprisonment. By pursuing a sexually-dangerous-person commitment instead, the prosecutor can greatly increase the offender's potential incarceration. Then too, a prosecutor may have a case which, for whatever reason -- problems with the witnesses or the like -- will be difficult to prove beyond a reasonable doubt. That problem can be avoided with a sexual-dangerousness action, one in which the prosecutor can compel psychiatric examinations and then use the psychiatrists, rather than witnesses to the underlying offense, to make its case. These potential abuses of the Sexually Dangerous Persons Act, especially the latter, can be minimized only by applying the privilege against self-incrimination to proceedings under the Act. Application of the privilege would make difficult the prosecutor's pursuing an adjudication of sexual dangerousness to avoid problems with his criminal prosecution.

The proceeding under the Sexually Dangerous Persons Act, like the proceedings reviewed in Specht and Humphrey, also involves the distinct finding of a person's sexual dangerousness and a radically different form of incarceration of indeterminate length. Thus, like the proceedings previously reviewed, it warrants the "full panoply" of procedural protections. The privilege against self-incrimination is truly a fundamental right and essential to a fair trial -- being, in the words of this

Court, the "essential mainstay" of the accusatorial system [Malloy v. Hogan, 378 U.S. at 7-8, quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)] and one of the basic "principles of a free government" [Id. at 9, quoting Boyd v. United States, 116 U.S. 616, 632 (1886)].[5]

The conclusion that the privilege against self-incrimination should be applicable in Illinois' sexually-dangerous-person proceeding does not depend alone upon this Court's rulings in regard to similar sex-offender legislation. It is instead bolstered by a consideration of other Fifth Amendment jurisprudence, cases considering the types of proceedings in which the privilege must apply.

Foremost among those cases is In re Gault, 387 U.S. 1 (1967). The Court, having previously held the privilege applicable in proceedings as disparate as bankruptcy [McCarthy v. Arndstein, 266 U.S. 34 (1924)], contempt [Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)] and forfeiture [Boyd v. United States, 116 U.S. 616 (1886)], in Gault extended it to juvenile-delinquency proceedings. After tracing the purposes and

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[5]Indeed, its importance in the context of involuntary commitments is no better underscored than in the mental-health-commitment statutes of Illinois which require that an examining psychiatrist inform his subject that the subject is not obliged to speak. Ill. Rev. Stat. ch. 91½, §3-208 (1983).

language of the privilege, the Court noted that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." Gault, 387 U.S. at 47. The state argued that juvenile proceedings were "civil" and not "criminal" in nature and thus that the privilege should not apply. That argument met the Court's quick reply:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty--a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

Id. at 49-50 (footnotes omitted).

This Honorable Court later quoted Gault with approval in Estelle v. Smith, 451 U.S. 454 (1981). At issue in that case was

whether a psychiatrist's testimony at a capital sentencing hearing regarding the defendant's "future dangerousness" violated the Fifth Amendment privilege against self-incrimination where 1) the testimony was based upon the defendant's statements to the psychiatrist during an examination and where 2) that examination was not preceded by warnings of the defendant's right to silence. The first inquiry, according to the Court, and the one of greatest import here, was the applicability of the privilege itself. Quoting Gault, the Court noted that the applicability of the privilege did not turn upon the type of proceeding involved but rather "upon the nature of the statement or admission and the exposure which it invites." Id. at 462. The defendant's statements, remarked the Court, could potentially result in the ultimate penalty of death. The Fifth Amendment privilege therefore applied since it protected the defendant from being a "'deluded instrument' of his own execution" as well as a "deluded instrument of his own conviction". Id. at 462, quoting Culombe v. Connecticut, 367 U.S. 568, 581 (1961). This conclusion was not affected, in the Court's judgment, by the fact that the defendant's statements were made in the context of a psychiatric examination inasmuch as that examination was not made for a neutral purpose and was not a response to psychiatric evidence introduced by the defendant. Id. at 465-466.

Taken together or separately, In re Gault and Estelle v. Smith are strong authority for the proposition that the privilege against self-incrimination should apply in the Illinois sexually-dangerous-person proceeding. Both cases caution against unthinking reliance upon procedural labels, especially the "'civil' label-of-convenience", attached to particular proceedings. The final result of the proceedings instead must be examined. As to the sexually dangerous person, that end result is the total deprivation of liberty. The person so adjudicated, as noted above, is committed to an institution. Indeed, that institution is not a mental health facility but is instead a maximum-security institution of the Department of Corrections. Like the world of the committed juvenile in Gault, the person's world becomes "a building with whitewashed walls, regimented routine and institutional hours". Gault, 387 U.S. at 27, quoting Holmes' Appeal, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (Musmanno, J., dissenting). His world is peopled by not only treating psychiatrists but also security personnel and persons serving sentences for formal crimes. His stay there is indeterminate in length but can far exceed the length of time spent by a convicted sex offender either there or in a less onerous penal facility. His commitment to such an institution for such a period of time must be considered criminal for purposes of the Fifth Amendment regardless of any procedural

label attached. See in this regard Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970), which extends the privilege to the state's criminal-sexual-psychopath proceeding, in part because of the psychopath's indefinite term of institutional commitment.[6]

The final result of the sexually-dangerous-person proceeding is not limited to the indefinite commitment to a penal institution as just discussed. The dangerousness adjudication also "invites exposure" to a serious societal stigma. At the close of the proceeding against him, the committed person is labeled not only as mentally disordered but also as one with propensities to the commission of sex offenses. He is, in precise terms, "sexually dangerous". That label is applied in a public proceeding. It can hardly be contested that the label makes him a pariah among his peers. See United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976) (addressing stigma attached to sexually-dangerous-person label) and People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352, 361-362 (1975) (addressing the "twin marks of mental and sexual abnormality"

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[6]The court also focused on the fact that the proceeding was suggested to be criminal by the legislature and arose only in the context of a criminal prosecution.

attaching to adjudication as a "mentally disordered sex offender").

Examination of the precedents of this Court thus compels the conclusion that the privilege against self-incrimination must be applicable in an Illinois sexually-dangerous-person proceeding. That proceeding, relating closely to a prosecution for crime, calling for a distinct finding of sexual dangerousness and leading to an indefinite commitment to a penal institution, is within the scope of prior decisions addressing similar statutes. Those decisions, looking to the seriousness of the statutes and the potential for their abuse, call for a "full panoply" of procedural protections, including, of necessity, the Fifth Amendment privilege. Similarly, looking at the nature and result of the sexually-dangerous-person proceeding, it must be concluded that the proceeding is "criminal" in nature for purposes of the privilege under the specific Fifth-Amendment cases of this Court.

C. THE ILLINOIS SUPREME COURT'S DECISION THAT THERE IS NO FIFTH-AMENDMENT PRIVILEGE IN SEXUALLY-DANGEROUS-PERSON PROCEEDINGS CANNOT STAND ON ITS OWN TERMS INASMUCH AS IT FOCUSES ONLY ON THE "CIVIL" LABEL GIVEN THE PROCEEDING AND TOTALLY MISPERCEIVES THE VARIOUS INTERESTS INVOLVED IN THE PROCESS.

Throughout the trial- and appellate-court processing of his case, the petitioner argued -- as he has above -- that the Fifth Amendment privilege against self-incrimination applied in the sexually-dangerous-person proceeding in which he was involved. Though accepted by the intermediate court of review, the contention was flatly rejected by the Supreme Court of Illinois. That court's ruling, though, cannot survive analysis even on its own terms and thus must be rejected by this Honorable Court.

In finding the privilege inapplicable in a sexual-dangerousness proceeding, the Illinois Supreme Court focused on the "civil" nature of the proceedings, both as announced in prior case law and as demonstrated in the supposed treatment purpose of the Act. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 695 (1985) (J.A. 46). That focus was totally inappropriate -- in a number of respects.

The focus on the "civil" label attached to the sexual-dangerousness proceeding, first of all, flies in the face of this Court's pronouncements on the subject. Specht v. Patterson, 386 U.S. 605 (1967), discussed at Part B above, could hardly be plainer in according fundamental rights and the essentials of a fair trial to the subject of a sexual-psychopath proceedings (Id. at 609-610) whether that proceeding is "denominated civil or criminal" (Id. at 608). In re Gault, 387 U.S. 1 (1967), too, cautions against disregarding substance

"because of the feeble enticement of the 'civil' label-of-convenience" attached to some proceedings. Id. at 50. Simply put, the "substance" of the sexually-dangerous-person proceeding is the respondent's indeterminate commitment to a penal institution. The "civil" label affixed by the legislature and repeated by the courts as to this proceeding cannot hide the simple fact that "within the context of this legislation, forced hospitalization is forced incarceration". Note, The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Law. 527, 556 (1965-66).

The Illinois Supreme Court's classifying the sexual-dangerousness proceeding as civil is no more justified by its reference to the supposed treatment purpose of the process. Legislation pertaining to the sexual psychopath, such as Illinois' Article 105 proceeding, does have a thread of therapeutic purpose and does in part implement the state's parens patriae authority to protect and care for the mentally ill. But sexual-psychopath statutes, particularly as they refer to the subject's present or future dangerousness to others, also have a strong police power basis and a strong purpose to protect society. Indeed the latter may predominate. See, e.g., Donaldson v. O'Connor, 493 F.2d 507, 524 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975) ("heavy police power emphasis" in confinement of sex offenders); Note, Out of Tune

With The Times; The Massachusetts SDP Statute, 45 B.U.L. Rev. 391, 399 (1965) (sexual-psychopath statutes "almost always" upheld on police power theory).[7]

That police-power purpose of institutionalizing the dangerous person to protect society comes through clearly in the Illinois procedure. The person is confined not in a mental-health facility -- an institution thought of for treatment -- but rather in a penal facility -- an institution synonymous with incarceration. Cf. French v. Blackburn, 428 F.Supp. 1351 (M.D. N.C. 1977), aff'd, 443 U.S. 901 (1979) (Mem.) (detention of a mental-health patient was unlike confinement since the commitment statute specified that no jail cell be used). The sexually dangerous person in Illinois is committed not only with others similarly adjudicated but also with persons committed for formal crimes. Cf. Sas v. State of Maryland, 295 F.Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (defective-delinquent statute thought

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[7]One of the psychiatrists involved in this case pointedly commented that, in his judgment, Department officials probably would be more concerned with ensuring that the committed person was no longer dangerous to society than with his being relieved of his disorder (R.134-135).

civil in nature since adjudicated persons were segregated in their own institution). That commitment is for an indeterminate term, lasting until the dangerous person can prove, on his own motion, that he has recovered. There is no provision for periodic review. Moreover, even the person's guardian -- the Department of Corrections -- is not required to take action to demonstrate his recovery. Compare in this regard Illinois' provisions regarding a "true" mental-health commitment -- provisions requiring, inter alia, initial commitments not to exceed 60 days, additional commitment in increments of 180 days, the prompt filing of a treatment plan and other affirmative action by the treatment-facility director. Ill. Rev. Stat. ch. 91½, §§3-813, 3-814 (1983).

All of this makes clear that the Illinois Supreme Court's reference to the treatment purpose of the Sexually Dangerous Persons Act is unjustifiable. Indeed, as a court examining the Act has declared, reference to the Act's purpose to treat and cure the committed person is "archaic" since "[a]ll too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." United States ex. rel. Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), cert. denied, 424 U.S. 947

(1976) quoting Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095, 1107 (1969).[8]

In ruling the Fifth Amendment privilege against self-incrimination inapplicable to the sexually-dangerous-person proceeding, the Illinois Supreme Court did not stop with reference to the "civil" nature of the proceeding, as just discussed. It went on to find that its ruling was supported by Mathews v. Eldridge, 424 U.S. 319 (1976), which "set out the factors relevant to the evaluation of a procedural due process claim". Allen, 481 N.E.2d at 695. The court then examined the three factors set forth in Mathews v. Eldridge and concluded that the test "totally support[ed]" its holding that the privilege did not apply. Id. at 695-696. Even if the test of Mathews v. Eldridge was properly utilized (but see Part B, supra), it is clear that the Illinois Supreme Court grossly miscalculated in examining the interests involved.

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[8]The Illinois court's reference to a treatment purpose of the Act is also undercut by two other facts. First, there is no consensus that sexual psychopaths can be treated at all. See Note, The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Law. 527, 552-553 (1965-66).

Then, too, no person can apply for the treatment provided by the Act. The treatment is instead applied upon petition of the prosecutor. Why treatment should be afforded only the adjudicated and not the volunteer is a mystery, especially

(Footnote Continued)

The court began, it should be noted, by conceding that the private interest involved in the case was "great". Id. at 695. That concession was necessary. The sexually-dangerous-person proceeding, as noted, involves an indeterminate commitment to a penal institution -- a "massive curtailment of liberty" of itself [Humphrey v. Cady, 405 U.S. 504, 509 (1972)] aggravated by its indeterminancy [see People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352, 360 (1975)] and by the possibility that it will exceed the sentence of a formally convicted sex offender [see Stachulak v. Coughlin, 520 F.2d at 936]. The proceeding also involves the double-barrelled stigma of being labeled both mentally and sexually disordered. People v. Burnick, 535 P.2d at 362; Stachulak v. Coughlin, 520 F.2d at 936. The court's concession of a "great" private interest was thus no overstatement.

The court immediately continued, however, that the second factor of Mathews v. Eldridge -- "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" -- favored exclusion of the privilege against self-incrimination. The proceeding already encompassed "numerous

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(Footnote Continued)
compared to the "true" mental-health procedure which typically contemplates voluntary commitments.

safeguards ensuring reliability", according to the court, and the privilege would add little more since it is "not primarily concerned with reliability". Allen, 481 N.E.2d at 695-696. That calculation, though, ignores more than it considers. As this Court noted in Gault, 387 U.S. at 44-45, reliability is a concern of the privilege since "a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." The possibility of a false acknowledgement of guilt certainly exists in the sexually-dangerous-person proceeding especially since, by definition, the proceeding involves persons alleged to have a mental disorder. The proceeding, additionally, involves inquiry into matters of a sexual nature -- a topic which, by common knowledge, invites a range of human responses from feigned ignorance to sophomoric bragging to outright lying. Given this real possibility of false statements, the remaining procedural safeguards of the proceedings -- the right to a jury, the requirement of proof beyond a reasonable doubt and the right to confrontation -- are simply inadequate. Regardless of the standard of proof applied, the composition of the fact-finder or the thoroughness of cross-examination, a false acknowledgement of sexual dangerousness almost certainly will result in an adjudication against the respondent.

The Illinois Supreme Court's miscalculation of the third factor of Mathews v. Eldridge is as obvious as that of the second

factor just discussed. In this regard, the court noted that "the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons, an interest which would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings." Allen, 481 N.E.2d at 696. While the State's interest in the matter is immediately apparent, the near impossibility of advancing that interest if the privilege is applied is not. It must be recalled that the sexual-dangerousness proceeding looks, in significant part, to proof of 1) the respondent's having criminal propensities toward sex offenses and 2) his having demonstrated those propensities. Ill. Rev. Stat. ch. 38, §105-1.01 (1981). Those elements can be proved objectively and without the aid of a psychiatrist, especially since the statute permits, if not contemplates, proof of the respondent's prior criminal activity (ch. 38, §105-5). The dangerousness proceeding, to be sure, also involves proof of the respondent's "suffering from a mental disorder" in existence for a year or more. It is to the proof of this element that the privilege against self-incrimination might be considered burdensome. But, as this Court has noted, it is appropriate to look to a state's procedures for involuntarily committing others for reasons of mental health when judging the procedures for committing sexual psychopaths, defective delinquents or the like.

See Humphrey v. Cady, 405 U.S. 504 (1972); Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1971) (dismissing certiorari as improvidently granted). And Illinois, it must be noted, demands that the person being examined for possible involuntary commitment be informed of his right to silence. Ill. Rev. Stat. ch. 91½, §3-208 (1983). It enacted that requirement deliberately, as "(e)xperience in the public and private sectors ha[d] shown that application of the privilege against self-incrimination [did] not seriously impair the state's ability to achieve the valid objectives of civil commitment." Matter of Rizer, 87 Ill. App. 3d 795, 409 N.E.2d 383, 386 (1980), quoting Governor's Commission for the Revision of the Mental Health Code of Illinois. This blunt statement in the area of civil commitment certainly undercuts any claim that application of the privilege would undermine the sexually-dangerous-person proceeding and its call for proof of the respondent's mental condition. For this reason and because the remaining elements of sexual dangerousness can be otherwise proved, the Illinois Supreme Court was simply wrong in stating (Allen, 481 N.E.2d at 696) that "[i]f a defendant is allowed to refuse to answer questions asked during a psychiatric examination then it would be

nearly impossible for the State to determine whether or not the defendant was sexually dangerous."[9]

It is clear, then, that the Supreme Court of Illinois grievously erred in its analysis of the three-factor test of Mathews v. Eldridge: it only grudgingly conceded the private interest, miscalculated the risk of an erroneous deprivation of that interest, and overstated the government's interest in proceeding without the sought-after safeguard. That three-factor test provided no support for its rejection of the privilege against self-incrimination in a sexual-dangerousness proceeding. The initial rejection of that privilege, in its own right, was mistaken since it focused only on the deceptive "civil" label and treatment orientation ascribed to the dangerousness proceeding. This Honorable Court must conclude, as a result, that the Illinois court's rejection of the privilege cannot be sustained.

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[9]This Court's ruling in Estelle v. Smith, 451 U.S. 454 (1981) underscores the error of the Illinois Supreme Court. Since a defendant could consent to or request a dangerousness examination or put his mental state in issue and since the State could prove dangerousness without resort to psychiatric experts by showing the personal background of the defendant and the circumstances of his crime, the Court was confident that its application of the privilege against self-incrimination would "not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute." 451 U.S. at 472.

D. SINCE THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES TO THE SEXUALLY-DANGEROUS-PERSON PROCEEDING, SINCE THE PETITIONER WAS NOT WARNED OF THAT PRIVILEGE BEFORE HIS CUSTODIAL EXAMINATION BY THE APPOINTED PSYCHIATRISTS, AND SINCE THE PSYCHIATRISTS BASED THEIR OPINIONS UPON THE PETITIONER'S UNWARNED STATEMENTS TO THEM, THE PROSECUTION COULD NOT PROPERLY INTRODUCE THE PSYCHIATRIC OPINIONS AGAINST THE PETITIONER.

In presenting his case to the Illinois trial court and the courts of review, the petitioner insisted that the privilege against self-incrimination applied to his sexually-dangerous-person proceeding. Having done so, he went on to argue that the appointed psychiatrists could not testify against him inasmuch as their testimony was based upon his statements to them and inasmuch as those statements, in turn, had not been preceded by warnings regarding the privilege. He cited this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), for that latter proposition. The appellate court agreed. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984). The Illinois Supreme Court had no occasion to reach the point, however. Having concluded that no privilege of silence existed in the proceeding, the court could dismiss Estelle and its call for warnings of that privilege. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 696 (1985).

The court's conclusion regarding the applicability of the privilege must be set aside, as argued at Parts B and C above. As that is done, Estelle again comes to the forefront in petitioner's request for relief -- for obvious reasons.

In Estelle, this Court considered the admissibility of a psychiatrist's opinion of a capital defendant's future dangerousness. Specifically, the Court inquired regarding a Fifth Amendment violation since that opinion was based upon an examination which had not been preceded by advice of the defendant's right to silence.

The Court's first step, as noted above, was determining the applicability of the Fifth Amendment to the case. Estelle, 451 U.S. at 462-463. Having concluded that the privilege of silence did apply, the Court addressed the other contentions of the parties. The State's claim that the defendant's statements to the psychiatrist during the exam were nontestimonial in nature was quickly rejected -- the Court finding that the psychiatrist based his opinion upon the substance of the statements and not upon his mere observation of the defendant when the statements were made. Id. at 463-465. Also rejected were the State's claims that the examination had been neutral in purpose, much like a competency examination, and merely responsive to a psychiatric issue raised by the defendant himself. In this regard, the Court noted both that the psychiatrist had gone beyond

establishing the defendant's fitness for trial to the decidedly adverse purpose of calculating his future dangerousness and also that the State had then affirmatively used the psychiatric calculation in making its case even though the defendant had offered no psychiatric evidence of his own. Id. at 465-466.

The Court in Estelle continued its analysis of the Fifth Amendment claim, importantly for the issue presented here, by considering the psychiatrist's failure to advise the defendant of his rights prior to the examination. The Court quoted its decision in Miranda v. Arizona, 384 U.S. 436 (1966) in detail:

> In Miranda v. Arizona, the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise."

Estelle, 451 U.S. at 466-467 (citations omitted). The Court went on to find that the considerations calling for advice to the

accused prior to interrogation applied full-force to the psychiatric examination at issue in the case. The defendant, after all, was in custody at the time of the examination; the examiner, in turn, had gone beyond the neutral purpose of judging fitness to become like an agent of the State in its quest to prove the defendant's future dangerousness. Id. at 467. The defendant had not "voluntarily consent[ed] to the psychiatric examination after being informed of his right to remain silent and the possible use of his statements." Thus, the State could not make use of his statements to the psychiatrist to establish his future dangerousness. Id. at 468. The Court concluded:

> "Volunteered statements . . . are not barred by the Fifth Amendment," but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. (Citation omitted.) These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

Id. at 469 (footnote omitted).

The reasoning and result of Estelle must apply in the case at bar as to the petitioner's adjudication of sexual dangerousness. The Fifth Amendment applies to the proceeding at issue here as it did to the proceeding in Estelle.

The State of Illinois, the respondent here, like the State of Texas in Estelle, cannot rely upon any claim that the petitioner's statements to the examining psychiatrists were nontestimonial in nature. The examining experts here spoke to the petitioner on a number of subjects, especially past sexual incidents and the originally charged crime (R.117-118; R.131). They formed their opinions of the petitioner's sexual dangerousness, in substantial part, on the basis of what he said to them (R.94; R.135; J.A. 43). Indeed, the State has never suggested that the psychiatric opinions were not the result of the petitioner's words during his examinations.

Moreover, the examinations here, like those in Estelle, went beyond any neutral purpose and were not conducted in response to psychiatric evidence presented by the petitioner. The latter point is abundantly clear: the petitioner produced no evidence at all in the course of the proceeding. The first point is clear as well: the examining psychiatrists did not stop with establishing the petitioner's general mental condition. They instead went far beyond to address the crucial elements of the sexual-dangerous proceedings: the existence of an established mental disorder, propensities for the commission of sex offenses and demonstrations of those propensities. These points of inquiry were certainly adverse to the petitioner; their establishment

would lead to his adjudication and commitment as a sexually dangerous person.

The examinations in this case resembled those in Estelle in respects important to the final step in the Estelle analysis. The examinations here, first of all, were court-ordered; the petitioner here, like Smith in Estelle, was simply not at liberty to decide whether he should participate. The exams, additionally, were conducted while the petitioner was in custody. Sheriff's deputies took the petitioner -- in handcuffs (R.110) -- from the Peoria County Jail to the doctors and stood outside the door during the psychiatric interviews (R.248). The petitioner, once inside, was "not in the presence of [persons] acting solely in his interest". Estelle, 451 U.S. at 467, quoting Miranda v. Arizona, 384 U.S. at 469. Instead, he faced psychiatrists specifically charged with gathering information on his alleged sexual dangerousness. The psychiatric examinations, finally, were not preceded by any meaningful advice regarding the petitioner's right to remain silent and the possible use of statements made during the exams. As found by the Illinois Appellate Court [People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135, 137 (1984) (J.A. 25)], Dr. Colen gave no warnings at all while Dr. Beck intimated only that "anything [petitioner] might say would be or could be put into a letter that would be sent back to the Court" (R.127). The petitioner simply was not

meaningfully informed of his right to silence or the consequences of his speaking.

Analysis of the case at bar then, in light of Estelle, can lead to only one conclusion: the State was not free to use the psychiatric opinions of Drs. Colen and Beck in making its case of the petitioner's sexual dangerousness. The petitioner enjoyed the privilege against self-incrimination in the course of the proceeding against him. He was nevertheless required, while in custody, to take part in psychiatric examinations which were not preceded by advice of the right to silence and of the consequences of his speaking. The psychiatrists ultimately advanced opinions based upon statements made by the unadvised petitioner. Under these circumstances, introduction of the psychiatric opinions violated the petitioner's Fifth Amendment privilege against self-incrimination and cannot be approved.

CONCLUSION

The Illinois Supreme Court affirmed the petitioner's adjudication and commitment as a sexually dangerous person over his claim that his Fifth Amendment privilege against self-incrimination had been violated. For the reasons set forth in this brief, the court's ruling must be reversed.

Respectfully submitted,

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APPENDIX A

Sexually Dangerous Persons Act, Article 105 of the Code of Criminal Procedure [Ill. Rev. Stat. ch. 38, §105-1.01, et seq. (1981)].

105-1.01. Sexually dangerous persons--Definition

§1.01. As used in this Act:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

105-2. Jurisdiction

§2. Jurisdiction of proceedings under this Act is vested in the circuit courts in this State, for the purpose of conducting hearings for commitment and detention of such persons, as hereinafter provided.

105-3. Petition--Contents

§3. When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person.

105-3.01. Civil nature of proceedings--Burden of proof--Procedure

§3.01. The proceedings under this Act shall be civil in nature, however, the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings of proof beyond a reasonable doubt. The provisions of the Civil Practice Act, and all existing and future amendments of that Act and modifications thereof and the Supreme Court Rules now or hereafter adopted in relation to that Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

105-4. Examination by psychiatrist

§4. After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent.

105-4.01. "Qualified psychiatrist"--Defined

§4.01. "Qualified psychiatrist" means a reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years.

105-4.02. Psychiatric examination in counties less than 500,000--Costs

§4.02. In counties of less than 500,000 inhabitants the cost of the psychiatric examination required by Section 4 is a charge against and shall be paid out of the general fund of the county in which the proceeding is brought.

105-5. Jury trial, right to--Evidence

§5. The respondent in any proceedings under this Act shall have the right to demand a trial by jury and to be represented by counsel. At the hearing on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were inflicted.

105-6. §6. Repealed by Laws 1955, p. 1144, eff. July 7, 1955.

105-7. Reserved.

105-8. Director of Corrections as guardian

§8. If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian. The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery. The Director may place that ward in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons. The Department of Corrections may also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall

also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall make such examination and the Department of Corrections may, with the consent of the chief executive officer of such other Department or Agency, thereupon place such patient in the care and treatment of such other Department or Agency.

105-9. Application showing recovery--Hearing--Discharge

§9. An application in writing setting forth facts showing that such sexually dangerous person or criminal sexual psychopathic person has recovered may be filed before the committing court. Upon receipt thereof, the clerk of the court shall cause a copy of the application to be sent to the Director of the Department of Corrections. The Director shall then cause to be prepared and sent to the court a socio-psychiatric report concerning the applicant. The report shall be prepared by the psychiatrist, sociologist, psychologist and warden of, or assigned to, the institution wherein such applicant is confined. The court shall set a date for the hearing upon such application and shall consider the report so prepared under the direction of the Director of the Department of Corrections and any other relevant information submitted by or on behalf of such applicant. If the patient is found to be no longer dangerous, the court shall order that he be discharged. If the court finds that the patient appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and recommit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment. Upon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed.

105-10. Conditional release--Petition--Revocation and re-commitment

§10. Whenever the Director finds that any person committed to him under this Act as now or hereafter amended, appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the Director of the Department of Corrections may petition the committing court for an order authorizing the conditional release of any person committed to him under this Act and the court may enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will

adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and re-commit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment.

105-11. Partial invalidity

§11. If any provision of this Act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

105-12. Custody transferred from Department of Public Safety to Director of Corrections

§12. Persons heretofore committed to the Department of Public Safety are deemed transferred and committed to the custody of the Director of Corrections.